ILLINOIS APPELLATE COURT, FIRST DISTRICT.

CHICAGO AND WESTERN INDIANA R. CO. *v.* COGGSWELL.

Eminent Domain—Change in Plan of Construction, after Assessment of Damages — Damages to Property not taken—Surface Road changed to Elevated Road.

SYLLABUS.

Change of plan of the public work contemplated, after assessment of damages, inflicting new damages not embraced in the former assessment, will entitle the owner to additional compensation therefor.

But where there was no restriction in the original assessment as to the plan of the work, the doctrine of *res fudicata* will apply, and all damages caused by the improvement proposed will be held embraced in the original assessment.

But a change of grade of a proposed railway after assessment from a surface road to an elevated road, is such a change as would not be embraced in the former assessment; and is ground for further proceedings.

Damages cannot be recovered by the owner of property by reason of what is done upon adjacent property, unless the same results in a physical injury to the property of claimant.

The measure of damages to property not taken for injuries done by public works is determined by comparing its value before and after the work is done which causes the injury.

The facts are sufficiently stated in the opinion of the Court.

OPINION OF THE COURT.

WATERMAN, P. J.—In 1880, appellee was the owner of a ten-acre tract of land in the town of Cicero, Cook County, Illinois, which was bounded on the north by Madison street, on the south by the centre line of Jackson Street, extended, and on the west by what would have been the centre line of West Forty-sixth Street if West Forty-sixth Street had been extended south of Madison Street.

Appellee's land which, including streets, was 333 feet east and west, by 1,320 feet north and south. Appellant being a railroad company, had, under an ordinance of the town of Cicero, granting it the right to do so, constructed and was operating a surface railroad, which ran north and south, immediately west of and adjoining the west line of appellee's land.

While thus operating said railroad and while under the ordinances of the town of Cicero, said railroad was permitted to cross Madison Street—"keeping and maintaining all street crossings in good condition and so that the same might be easily crossed in all directions" "without danger to person or property;" the railroad company condemed the west thirty-three feet (or one acre) of appellee's land, for the purpose of its right of way, thus making its right of way sixty-six feet wide. At the time of the trial of the condemnation case in 1884, a jury was waived, and the judge viewed the premises; the surface road was there and in operation at that time; the finding awarded the value of one acre, and declared the remaining nine acres would not be damaged; judgment was entered on the finding, the money was paid, and the appellant went into possession. In 1885 the appellant procured a new ordinance granting it the right to erect a viaduct over Madison Street and to construct its approach thereto from the south, and in 1885 it so constructed said viaduct and approach; that the structure was about eighteen feet high at Madison Street and about eight feet high at the south line of appellee's land. Appellee claims there was no authority of law at the time of the condemnation proceeding to consider the damages to the remainder by reason of an elevated structure, and that this is such a change of plans as authorizes, under the law, the recovery of such additional damages as the evidence shows was caused by such change.

The questions presented in this record, briefly stated, are: Where in condemnation proceeding instituted by a railroad, the damage to property not taken has once been judicially ascertained, and thereafter the grade of the road opposite such property is raised from eight to seventeen feet and thereby the value of the property is lessened; is the owner of such property entitled to additional compensation?

That a recovery may be had for damages caused by a change in the plan of construction with respect to which damages were originally assessed, is established both upon principle and authority.

The reason is obvious. The property owner is entitled, in the absence of anything showing how the road is to be constructed or used, to such damages as it is reasonably probable will ensue from the construction and operation of the road: C. B. & N. R. R. Co. *v.* Bowman.[1] If the road desires to stipulate for any particular mode of construction or operation, and have an assessment of damages limited to such mode, it has a right to do so.[2]

Manifestly, then, damages having been assessed upon the basis of a certain plan of construction, if a change is made to another mode, the property owner is entitled to such additional damages, if any, as arise from a manner of construction, concerning which there has been no assessment or payment of damages.[3]

It follows, therefore, that damages done to land, not taken, having once been assessed, when additional damages are claimed upon the allegation that the assessment which has been had was upon the basis of a special mode of construction or operation which has since been departed from; the first question for determination is with reference to what special kind of construction or operation were the damages in the first litigation had? In other words, what are the sources from which the damages once awarded sprang?

If in the former proceeding there was no restriction whatever; if damages were then assessed for everything which it was reasonably probable would ensue from the taking and use of certain land for railroad purposes, then there can be no additional damages from the use for the same purpose of the same land.

It does not appear that in the former proceeding any particular mode of construction was stipulated for, or that

[1] 122 Ill., 595.

[2] C. & A. R. R. Co. *v.* J. L. & A. Ky. Co., 105 Ill., 388; Jacksonville & Savanna R. R. Co. *v.* Kidder, 21 Ill., 131; Hayes *v.* Ottawa, Oswego & Fox River Valley R. R. Co., 54 Ill., 373.

[3] Wabash, St. Louis & Pacific Ry. *v.* McDougall, 118 Ill., 229–238; Same *v.* Same, 126 Ill., 111–120; C. & A. R. R. Co. *v.* J. L. & A. Ry. Co., 105 Ill., 388; Peoria & Rock Island Ry. Co. *v.* Birk, etc., 62 Ill., 332.

any special plan was submitted; but it is shown that the judge before whom the cause was tried, a jury having been waived, inspected the premises and saw that the road was then constructed and passed the premises now under consideration at about the natural surface of the ground.

Were, then, the damages proceeding in the former assessed with a view to the existence of a surface road only?

In St. Louis, Jacksonville and Chicago Railway Co. *v.* Mitchell, 47 Ill., 165, it was held in a proceeding to obtain the right of way across certain lands, that for the purpose of reducing the damages, evidence should have been admitted to show that the company had contracted for the building of a fence through the land, and had provided the lumber therefor. It would seem from this that if the jury had visited the premises and found a fence already constructed by the company, they would have been bound to take such fact into consideration in arriving at their verdict.

In Carpenter *v.* Eastern & Amboy R. R. Co.,[1] it appeared that the commissioners to assess damages from the taking and use of a right of way for a railroad, proposed to be located through a farm, were informed by agents of the company that the road would pass over the farm by an iron bridge supported by abutments, and assessed damages, and a settlement was made upon that understanding. The road having changed its intention and concluded to cross the farm by a "fill," the Court upon this state of facts held that the owner was entitled to recover such increased compensation as was equal to the increased damage.

In Boyd *v.* Negley,[2] it is said that when a petitioner adopts a grade before the damages are assessed, and marks the grade upon grade-pins along the route, these having been seen by the jury, it must be presumed to have assessed such damages as would be caused by the construction of a road with the grade marked and

[1] 24 N. J. Eq.
[2] 53 Penn. State, 387.

with the filling or embankments indicated. It is questionable whether, in view of the proximity of Madison Street, which the road crossed; appellant had at the time of the former proceedings any such authority from the town of Cicero, in which these lands were, as would have enabled it to have passed the premises of appellee upon any grade save one nearly that of the natural surface. The ordinance authorizing the construction of a viaduct seems to have been passed September 26, 1885; the judgment in the former proceeding was entered May 31, 1884. We are, for these reasons, of the opinion that damages must be presumed to have been in the former proceeding assessed upon the basis of a road passing the premises of appellee at about the natural surface grade. The change of construction that has been made since the former proceeding, is that the road passing and near to the premises of appellee, has been raised, an embankment having been constructed, varying in height from eight to seventeen feet; this embankment has been constructed and the road runs upon land which the company own in fee.

What are elements that may be considered in ascertaining the sum, if any, which appellant is entitled to recover because of the building of this embankment and the running of trains thereon?

Any real property may be damaged or benefited by what is done upon property adjacent to it or in the vicinity.

As the owner cannot be called upon to pay private individuals or corporations for the benefit which may come to his property from the construction by them of manufactories or fine dwellings in the vicinity of his premises; so there are certain depreciations in the value of his lands for which, arising as they may, from things which every owner of property had a right to do, he cannot claim compensation.

If an unsightly structure be erected, or suffered to remain in a beautiful residence neighborhood, its tendency is to depreciate the value of surrounding property, but it is not a damage for which a recovery can be had.

So, too, a beautiful view, the prospect which one has

from his windows, adds to the value of his home, and positive damage is done when his neighbor, by the rearing of a lofty structure, shuts out all sight of the pleasant landscape; but the law affords for such damage no redress.

The maxim, "*Sic utere tuo ut alienum non laedas*," in its practical application, means only that one in the use of his own property must not infringe upon the lawful rights of others.

Had the strip of land to the west of appellee's premises, upon which this railroad runs, been owned by a private citizen, he might have built thereon an embankment or a wall seventeen or forty feet high, without rendering himself liable to appellee for the loss of view he had thus caused, or the difficulties he had thrown in the way of the opening of streets running through and west of the premises of appellee. So, too, such private owner, in an uninhabited neighborhood, such as this was, might have built upon his premises a saw-mill, an ice-house, cattle-sheds or other structures undesirable in a fine residence neighborhood, but whose erection would have been a lawful use and one of which the appellee could not have successfully complained in a court of justice.

Buildings and works of this class might have been entirely inconsistent with the use to which appellee designed to put his property. They might have rendered his property less or more valuable than it otherwise would have been, might practically have put money in or taken it from his pocket, yet he would not in either case have been called npon to pay or been entitled to receive compensation.

We understand that the Constitution and laws of this State, so far as compensation is concerned, place the taking and use of property for public purposes in the condition that exists with respect to private use. The owner of property taken or held for public purposes, if he devote his property to any use which would be a nuisance, or would be actionable if done by a private citizen, may be made to pay just compensation for the damage done to the property of others by such use; but the liability of the owner of property de-

voted to public uses is no greater than is that of the owner of property held for private purposes; the right of one to use without being liable for damage is the equal of the other.

In Rigney *v.* the City of Chicago,[1] the Court says: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station or the like will generally cause adirect depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria.*"

And further, in the same case, the Court said: "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

To the same effect are the cases of City of Chicago *v.* Union Building Association,[2] City of Olney *v.* Wharf,[3] Hall *v.* Mayor of Bristol,[4] Chamberland *v.* West End Ry. Co.[5]

The erection of an embankment upon the premises of appellee, no right of access or approach having been disturbed, did not, nor does the mere running of cars thereon constitute a physical disturbance of any of appellee's rights.

The Court ought not therefore to have permitted evidence of damage because of the erection of an embankment, to have been given to the jury. So far as appears, appellee never had any rights touching the construction of an embankment upon the premises of appellant, or to have his, appellee's, land left so that streets could be cut across it

[1] 102 Ill., 64–80.
[2] 102 Ill., 379–394.
[3] 115 Ill., 519.
[4] 2 Law Repts. C. P. C., 322.
[5] 10 E. C. L., 704.

without going under a railroad track, or to have the strip of land lying west of his grounds occupied by undesirable structures, or such as would depreciate the value of his property.

Appellee, we presume, did have the right that dust, smoke and cinders should not be thrown upon his premises; such action upon the part either of a private individual or the public, it is quite likely, would have been a direct physical disturbance of a right which appellee had in connection with his property; for such disturbance upon the part of an individual, the law has always afforded a remedy; and in this State since the adoption of our present Constitution, providing that private property shall not be damaged for public use without just compensation, a remedy is given to the owner for such interference, whether by or for the public, or by private individuals.

Our attention has been called to the language of the Supreme Court, repeatedly used, that in cases arising under the provisions of the Constitution relative to the damaging of property for public use, "the depreciation is determined by comparing its value before and after the structure is made which produces the injury."

As applied to the facts of the cases in which such language was used, it was correct and applicable. Such language has not, however, so far as we are aware, been used in a case like the present, or in any instance where an attempt had been made to recover damages for the doing for public purposes of that for which, if done for private uses, no action would have lain.

In the former proceeding damages were awarded to the owner of these premises for the taking of a strip of land, thirty-three feet wide, adjacent to and west of the land now under consideration, and an adjudication was also had as to the damage which, as the owner of these premises, it was reasonably probable he would sustain from such taking and from the construction and operation of a railroad as then proposed and indicated; that included such throwing of smoke, cinders and dust upon these premises as it was

reasonably probable would ensue from a railroad running at about the natural surface of the ground. If the subsequent elevation of the track causes any more than this quantity of cinders, etc., to be cast upon the premises of appellee, and thereby he suffers an additional damage, he is entitled to recover therefor.

In saying what we have as to the throwing of dust, cinders, etc., upon the premises of appellee, we do not wish to be understood as prejudging the case at bar. Upon another trial, as in all cases of this kind, the right to recover for interference with an alleged right appurtenant to property must necessarily depend upon the existence of the rights asserted. In this respect the rights as to property vary with the situation, surroundings, etc. If a person erect a dwelling-house in the immediate vicinity of a blast furnace and rolling-mill, it would hardly be contended that, having seen fit to go and make his home in such a neighborhood, he would be entitled to enjoin the proprietors of the furnace from filling the air with smoke or from disturbing the serenity of his repose by the loud and jarring noise the carrying on of their works necessarily involved.

Every person has a right to the reasonable enjoyment of his property. What is a reasonable use of one's property must necessarily depend upon the circumstances of each case; for a use for a particular purpose and in a particular way, in one locality, might be lawful, and a nuisance in another[1]

It is urged that the conclusion arrived at in the former proceeding that these lands would not be damaged by the construction of this road running at about the natural surface grade, must have been upon the theory that the benefit derived from the opportunity thus afforded for switch connection from manufactories and coal yards that might be located on these lands, equaled any damage incident to its construction and operation. Appellee insists that there is

[1] Barnes *v.* Hawthorn, 54 Me., 124; Wier's Appeal, 74 Penn St., 230; Bamford *v.* Tumley, 3 B. & S., 62; Tipping *v.* St. Helen's Smelting Co., 4 B. & S., 608.

no opportunity for switch connection from his premises with the road as now constructed, and that consequently his lands do not now have a benefit considered in the former proceeding.

Upon what theory the Court came to the conclusion arrived at in the former proceeding, we cannot know.

By the former judgment it was established that these lands were not damaged by the road as it then existed.

By the change of grade which has since been made, the right to have switch connections has not been taken away. No switch connections have been destroyed; the property was then and is now vacant and occupied.

All that had been done in this regard is that the present grade may require that the manufactories, etc., hereafter located on these premises, shall, in order to have useful switch connections, be constructed with reference to the present situation; such construction may be more expensive and may be more or less advantageous than one adapted to switch connection with a road running at a natural surface grade.

It is not difficult to see that there may be advantages or disadvantages in having a railroad pass one's premises upon a viaduct seventeen feet high rather than upon the surface of the ground.

All these things may be properly taken into consideration in the case, it being borne in mind that a recovery can be had only for such damages, if any, as are in addition to any that arose from the road when running at about the natural surface; and that damages can only be awarded for a direct physical disturbance of a right which the property owner has in respect to his property, a right which exists in respect to the use for private as well as public purposes of other property.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

ADDITIONAL DAMAGES FOR CHANGE OF PLAN.

In many ways the first three propositions laid down in the opinion and noted in the head-notes, relating to additional damages by change of the plan of the proposed improvement, serve to point out the incompleteness of the statutory requirements and conditions imposed upon parties seeking to exercise the power of the government to take property for public use. A short remedy is to require that the party seeking to exercise this power file a plat with plans and specifications of the improvement, notify the world thereof, and then be held to that plan. In Illinois this result has been reached by a series of decisions: Jacksonville, etc., R. Co. *v.* Kidder, 21 Ill., 131; St. Louis, etc., R. Co. *v.* Mitchell, 47 Ill., 165; Peoria, etc., R. Co. *v.* Birkett, 62 Ill., 332; Peoria, etc., R. Co. *v.* P. & Farmington R. Co., 105 Ill., 110; Chicago & N. W. R. Co. *v.* Chicago & Evanston R. Co., 112 Ill., 589; Ill. & St. L. R. & Coal Co. *v.* Switzer, 117 Ill., 399; Wabash, St. L. & P. R. Co. *v.* McDougal, 118 Ill., 229; S. C., 126 Ill., 111.

And in these cases it is held that the party exercising the power and filing the plan cannot afterwards substantially deviate from the plan on the basis of which the compensation was estimated without being liable for any damage which results from such change.

This has long been the rule both by statute and judicial construction in cases of municipal improvements by special assessment, and should be so, and frequently is, in the kindred condemnation cases.

For rule in special assessment cases, see, Kneeland *v.* Furlong, 20 Wis., 437; Houghton *v.* Burnham, 22 Wis., 301; City of Springfield *v.* Mathers, 124 Ill., 88; Pearce *v.* Hyde Park, 126 Ill., 287; 1 Starr & Curtis, Ill. Statutes C. 24, ¶ 135.

For similar rule in condemnation proceedings, see, Lancaster *v.* Kennebec Log, etc., Co., 62 Me., 272; In *re* N. Y. & Boston R. Co., 62 Barb., 85; Indianapolis, etc., R. Co. *v.* Reed, 52 Ind., 357; Convers *v.* G. R. & I. R. Co., 18 Mich., 459; Warren *v.* Spencer Water Co., 143 Mass., 9; Kenein *v.* Arlington, 144 Mass., 456; Woodbury *v.* Marblehead Water Co., 145 Mass., 509; Hamor *v.* Bar Harbor Water Co., 78 Me., 127; In *re* Boston *re* R. Co., 10 Abb. N. C., 104; N. Y. & A. R. Co. *v.* N. Y., & C. R. Co., 11 Abb. N. C., 386.

The requirement of the law as to description of improvement cannot be disregarded: Riddle *v.* Animas, etc., R. Co., 5 Col., 230; Heck *v.* School District, 49 Mich., 551; Darlington *v.* U. S., 82 Pa. St., 382; Williams *v.* Hartford, etc., R. Co., 13 Conn., 397.

Proceedings for one work cannot be made to cover a new and different work. Damages assessed on one basis cannot be made to embrace injuries inflicted by work on another and different basis.

Where there was no restriction of plan in the original work the damages must be held to have been assessed for any work coming within the terms of the work as proposed.

A fundamental change in the character of work, such as in the fair interpretation of language would not be embraced in the description of the work proposed, may be the basis of a fresh assessment of damages even where no restriction of plan existed in the original.

Concerning this last rule, we may suggest that the party seeking to condemn property files a petition describing the proposed work. This description is part of a pleading and should be construed like other pleadings, most strongly against the pleader: 1 Chitty Pleading, 261 and cases cited.

It may be objected that this rule applies during the continuance of the suit, and that after judgment, under the rule of *res judicata*, they should be construed broadly to embrace everything involved in the issue.

There are two answers to this. First, the latter rule applies to the *judgment* itself, but not to the pleadings on which it is based.

Secondly, the judgment in condemnation proceedings operates not only as a satisfaction of past injuries but as a license for future acts, and the effect is therefore *continuing* as to the *thing licensed;* and affords no license for another and *different* thing.

The short point decided is, therefore, that a change of grade in a railway is in itself a source of damage to property for which damages should be assessed, and is so where damages for location have been previously assessed, just as it would be if no previous proceedings for other purposes had occurred.

The proposition that a change of plan, causing fresh damages after the assessment of damages has been had, is ground for fresh recovery, has been laid down in the following cases, as well as those cited in the opinion: McCormick *v.* Kansas City, etc., R. Co., 57 Mo., 433; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan., 608; Hill *v.* Mohawk & H. R. Co., 7 N. Y., 152, 157; Carpenter *v.* Eastman, etc., R. Co., 24 N. J. Eq., 249, 408; 26 N. J. Eq., 168; Wabash St. L. & P. R. Co. *v.* McDougall, 118 Ill., 229-238; S. C., on further hearing, 126 Ill., 111.

In the latter case the Court says: "In an original proceeding to condemn the measure of damages is the difference between the value of the land as a whole, before and after the construction of the road built according to the plan proposed." Chi. & P. R. Co. *v.* Francis, 70 Ill., 235; Page *v.* Chi., etc., R. Co., 70 Ill., 324; Eberhart *v.* Chi., etc., R. Co., 70 Ill., 347; Dupuis *v.* Chi. & North Wisconsin R. Co., 115 Ill., 97; C. B. & N. R. Co. *v.* Bowman, 122 Ill., 595. "If, after damages have been assessed, or settled by agreement, a change in the plan of construction involving more damages is made, the owner may demand a new assessment as to such increase of damages." Mills on Eminent Domain, 219.

A legislative precedent for this doctrine may be found in the numerous Mill Acts authorizing the compulsory flooding of lands for milling purposes on payment of compensation. Very early in the history of Virginia (1792), the Legislature provided that the owner of a mill dam might raise his dam by suing out a second writ to assess the first damages (1 Va. St. at Large, *N. S.*, 136, 137, Va. Abr. Pub. Laws, 1796, p. 209, 211). And the original writ required an assessment of damages *so far as they could be foreseen, upon view.* This is preserved in the present Act. Code of Va., 1873, Title 19, C. 63, S. 11. And damages by breaking of the dam are recoverable at law as unforeseen (Wroe *v.* Harris, 2 Wash., 126). See also the similar statute and rule in Indiana (Honenstine *v.* Vaughan, 7

Black, 520). And this was followed in many of the Southern and Western States. See Gould on Waters, Ch. XIV, §§ 609, *et seq.*

The general rule of law, that where a permanent grade of a highway is established, the body changing the grade of the street is liable for damages caused by the change, is recognized by numerous authorities, in those States which admit of any recovery of damages caused by authorized public works *to property not taken.*

Goodall *v.* Milwaukee, 5 Wis., 32; Pearce *v.* Milwaukee, 18 Wis., 428; Goodrich *v* Milwaukee, 24 Wis., 422; Crossett *v.* Janesville, 28 Wis., 420; Dore *v.* Milwaukee, 42 Wis., 108; Rigney *v.* Chicago, 102 Ill., 64; E. St. Louis *v.* Lockhead, 7 Ill., App. 83; E. St. Louis *v.* O'Flynn, 19 Ill., App. 64; Caledonian Ry. Co. *v.* Walker's Trustees, L. R., 7 App. Cases, 259; Leader *v.* Moxon, A.D. 1773, 3 Wils., 461, S. C., 2 Bl., 924; Rhodes *v.* Cleveland, 10 Ohio Rep., 159; M. Combs *v.* Akron, 15 Ohio Rep., S. C., 18 Ohio Rep.; Combs *v.* Pittsburgh, 18 Penn. Rep., 187.

Contra: Governor & Co. of British Cast Plate Mfrs. *v.* Meredith, A. D. 1792, 4 T. R., 794; Sutton *v.* Clark, 6 Taunt, 28; Jones *v.* Bird, 5 B. & Ald., 837; Callender *v.* Marsh, 1 Pick, 417; Rude *v.* St. Louis, 93 Mo., 408; Keasy *v.* Louisville, 4 Dana (Ky.), 154; Humes *v.* Mayor of Knoxville, 1 Humple (Tenn.), 403; Radcliff's Exrs. *v.* Mayor of Brooklyn, 4 N. Y. 195. And see Lewis, Eminent Domain, § 96, and cases cited.

But as will be seen by a casual reference to the authorities, the primary doctrine that damages by authorized public works to property not taken may be recovered, is itself of recent growth.

The rule forbidding recovery for change of street grade has been established prior to the constitutional changes admitting recovery for damages to property not taken. Now that these damages are generally recoverable, the case of damages from changes in the street grade should follow the constitutional change.

In some States these damages were recoverable before the change. See the Wisconsin authorities, cited *supra* and Ill. Grand Rapids, etc. Co. *v.* II Heisel, II N. W. Rep. (Mich.), 212; Eaton *v.* B. C. & M. R. Co., 51 N. H., 504; and in some they have been made specially recoverable by statutes thereon. See Ind. R. S., 1881, 3073; Iowa Code, 469; Mass. Sts., C. 44, 19, 20. For changes in the grade of streets of New York City, N. Y., see laws of 1852, C. 52, p. 46, 47; 2 L. 1867, C. 697, pp. 1748, 50 2 N. Y. L., 1872, C. 729, p. 1726; Pennsylvania. See matter of change of grade of Fifth and Sixth Streets, 12 Phila., 587. For a collection of decisions on these statutes, see Lewis, Em. D., §§ 207–218.

The constitutional change itself is an interesting piece of history. In the early history of the country the rule had been settled, except in a few jurisdictions, that damages to property not taken could not be recovered.

By the Illinois Constitution of 1870, the constitutional provision was made to read: "Private property shall not be taken *or damaged* for public use without just compensation." So far as the writer has been able to astertain, this was the first constitutional provision expressly extending the

remedy to damages to property not taken: Ill. Cont., 1870, Art. II, § 13, 1 Starr & Curtis; Ill. Statutes, p. 105, 1037.

Similar provisions have been since adopted in several States as follows: West Virginia, Art. III, § 9, in 1872; Pennsylvania (taken, *injured* or destroyed), Art. I, § 8, 1873; Arkansas (taken, damaged or destroyed), Art. II, § 22, 1874; Missouri, Art. I, § 20, in 1875; Nebraska, Art. I, § 21, in 1875; Alabama (same as Pennsylvania), Art. XIII, § 7, 1875; Texas, Art. I, § 17, in 1876; Colorado, Art. II, § 14, in 1876.

In England, the Land Clauses Consolidation Act of 1845 (§ 68) allows recovery of compensation for property "injuriously affected;" and this has been repeatedly construed to include damages to property not taken: Hall *v.* Mayor of Bristol, L. R., 2 C. P., 322; Ripley *v.* Great Northern R. R. Co., L. R., 10 Ch. App., 435.

The rule is, therefore, now well established in this country and England, and we may expect that it will become universal.

The limitation indicated in the opinion that the damage or injury must be "physical;" and that it will not include damages by obstruction of view, by noise, vibration, etc., results from an application to the question of various rules in the law of easements, including the right to build indefinitely, upward or downward, etc.

But a moment's reflection satisfies any one that "view" is a "physical" attribute, an injury to which is a physical injury; that noise and vibration are "physical" phenomena, and so far as injurious are physical injuries. A judicial definition of "physical," which would exclude these injuries, is unscientific and destined to modification. The language of the rule will be changed, and possibly the rule itself.

On principle there is ample room for argument that, in the compulsory divesting of one person's rights and investing of another persons' corresponding rights, for a *fair compensation* and fixed price, the divesting of one person's rights to view, to freedom from unwholesome surroundings, or to freedom from noise and vibration are elements to be included in the compensation. The right to the enjoyment of these is not *physical*, but *no right to enjoyment* is physical. The objects to which these rights apply and the *media* through which they are enjoyed and their *relation* to the *corpus* of the property taken *are* physical just as much as in any other case. The effect of such divestiture of rights is visible in the market value of the property and is measured by dollars and cents in the real estate world just as much as any other.

As the effect of the constitutional provisions above cited has been to enlarge indefinitely the scope of damages to be compensated, it may be anticipated that there will be a tendency to still further extend the field and to embrace all elements which affect the market value of the property.

MERRITT STARR.

Chicago, July 25, 1892.